



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2012

Mr. Thomas D. McClure
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-15947

Dear Mr. McClure:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 465836 (DSHS OR File No. 20598/2012).

The Texas Department of State Health Services (the "department") received a request for all e-mails sent between two named officials of the department during a specified time period. You state some of the requested information either has been or will be released. You claim other responsive information is excepted from disclosure under sections 552.101, 552.107(1), 552.111, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.²

¹Although you do not specifically claim section 552.137 of the Government Code, but have marked information to be withheld on that basis, we will address section 552.137, which is a mandatory exception to disclosure. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). We note you cite to section 552.116 of the Government Code, but have submitted no arguments in support of the applicability of that exception. Therefore, this decision does not address section 552.116. See Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments explaining applicability of each exception it claims).

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note the present request for information includes questions. A governmental body is not required to answer factual questions, conduct legal research, or create new information in responding to a request for information under the Act. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, a governmental body is not required to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that received the request. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). A governmental body must make a good-faith effort, however, to relate a request to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the department has done so.

You indicate some of the information at issue may be encompassed by Open Records Letter No. 2012-14147A (2012), which involved a request to the department for information involving the same two officials whose communications are the subject of the present request. Open Records Letter No. 2012-14147A concludes some of the information at issue in that ruling is or may be excepted from disclosure under sections 552.101 and 552.117 of the Government Code. You do not indicate there has been any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, to the extent Open Records Letter No. 2012-14147A encompasses any information responsive to the present request for information, the department must dispose of any such information in accordance with the previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)). To the extent the previous ruling does not encompass the information responsive to the present request, we will address your exceptions to disclosure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the identities of victims of alleged sexual harassment were held to be protected by common-law privacy. You seek to withhold the information submitted as Exhibit B on privacy grounds. We note the information at issue pertains to an allegation of sexual harassment and contains the identity of the alleged sexual harassment victim. We therefore conclude the department must withhold Exhibit B in its entirety under section 552.101 of the Government Code in conjunction with the common-law right to privacy and the decision in *Ellen*.³

³As we are able to make this determination, we need not address your other arguments against disclosure of Exhibit B.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the information in Exhibit D under section 552.107(1). You state the information at issue consists of communications between and among attorneys for and officials of the department. You have generally identified the parties to the communications. You indicate the communications were made in connection with the rendition of professional legal services to the department and were intended to be and remain confidential. Based on your representations and our review, we conclude the department may withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative

process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order for section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body.

Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You seek to withhold most of the information in Exhibit C on the basis of the deliberative process privilege under section 552.111. You state the information at issue is related to decision-making processes involving the department's Health Promotion and Chronic Disease Prevention Section. Based on your representations and our review, we conclude the department may withhold the information we have marked under section 552.111 of the Government Code. Although you generally contend section 552.111 is applicable to other information in Exhibit C, you have not demonstrated any of the remaining information at issue consists of advice, opinions, or recommendations related to the department's policymaking processes. We therefore conclude the department may not withhold any of the remaining information in Exhibit C under section 552.111.

Lastly, section 552.137 of the Government Code states "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses in Exhibit C the department must withhold under section 552.137 of the Government Code unless the owner of an e-mail address has affirmatively consented to its public disclosure.⁴

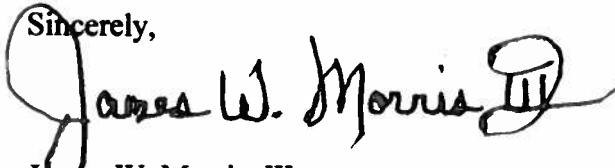
In summary, the department (1) must dispose of any information encompassed by Open Records Letter No. 2012-14147A in accordance with that decision; (2) must withhold Exhibit B in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*; (3) may withhold Exhibit D under section 552.107(1) of the Government Code; (4) may withhold the information we have marked in Exhibit C under section 552.111 of the Government Code; and (5) must withhold the e-mail addresses we have marked in Exhibit C under section 552.137 of the Government Code unless the owner of an e-mail address has consented to its disclosure. The rest of the submitted information must be released.

⁴The department's markings indicate e-mail addresses have been redacted from the information in Exhibit C. We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold certain types of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, stylized "J" at the beginning.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 465836

Enc: Submitted documents

c: Requestor
(w/o enclosures)